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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT ERIKSSON, Plaintiff and Appellant, v. GOVERNMENT EMPLOYEES INSURANCE COMPANY, Defendant and Respondent.	D037035 (Super. Ct. No. GIC 748929)

APPEAL from a judgment of the Superior Court of San Diego County, William R. Nevitt, Jr., Judge. Affirmed.

Plaintiff Robert Eriksson appeals a judgment in favor of defendant Government Employees Insurance Company (GEICO) after the court sustained without leave to amend GEICO's demurrer to Eriksson's cause of action for breach of the implied covenant of good faith and fair dealing. The action arose when GEICO denied Eriksson's uninsured motorist claim after discovering the driver at fault was insured. Eriksson

contends: (1) he established coverage under the insurance policy when GEICO offered to pay his claim under the uninsured motorist provision and Eriksson accepted the offer; (2) GEICO expressly waived a condition precedent to uninsured motorist coverage by its agreement; and (3) GEICO is estopped from denying coverage because its conduct misled Eriksson to his detriment. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Eriksson was insured by GEICO under an automobile insurance policy that included uninsured motorist coverage. In June 1999, Eriksson was driving his car behind his wife's car when Rafael Castillo failed to stop at a red light and struck the Erikssons's cars. Eriksson submitted a claim to GEICO for his personal injuries. GEICO informed Eriksson it was evaluating his claim and investigating whether Castillo was insured.

In November 1999, GEICO settled the personal injury claim of Eriksson's wife for $2,000 under the uninsured motorist provision of her insurance policy. GEICO offered to settle Eriksson's personal injury claim under the uninsured motorist provision for $3,300. In February 2000, Eriksson rejected GEICO's offer and counter-offered to settle for $6,500. In April 2000, GEICO rescinded its offer to handle Eriksson's personal injury claim under the uninsured motorist provision of the policy and terminated all negotiations. Eriksson, after relying on GEICO's promise to handle the matter as an uninsured motorist claim, discontinued efforts to resolve the matter with Castillo and/or his insurance carrier, Orion Insurance (Orion). Consequently, Eriksson was forced to incur expenses by filing a lawsuit against Castillo in order to toll the statute of limitations and protect his rights.

Eriksson sued GEICO for breach of the covenant of good faith and fair dealing. GEICO demurred on the ground the complaint admitted Castillo was insured by Orion, thereby establishing Eriksson's claim was not covered under the uninsured motorist provision of his insurance policy. In his opposition, Eriksson conceded Castillo was insured by Orion. However, he argued GEICO had waived or was estopped from denying coverage because it agreed to handle the claim under the uninsured motorist provision of the policy.

The court sustained the demurrer without leave to amend, finding Eriksson admitted in his complaint that Castillo was insured. The court further found an insurer's post-loss conduct cannot create coverage through waiver or estoppel when coverage does not otherwise exist. The court later modified its ruling by granting Eriksson leave to amend his complaint except as to his cause of action for breach of the implied covenant of good faith and fair dealing against GEICO. Eriksson did not amend his complaint. The court entered judgment in favor of GEICO.

DISCUSSION

On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, we review the order de novo, exercising our independent judgment on whether, as a matter of law, the complaint states a cause of action. (*Lazar v. Hertz Corp*. (1999) 69 Cal.App.4th 1494, 1501; *Trinkle v. California State Lottery* (1999) 71 Cal.App.4th 1198, 1201.) We assume the truth of all properly pleaded facts, as well as facts inferred from the pleadings, and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. (*Morillion v. Royal Packing Co*.

(2000) 22 Cal.4th 575, 579; *Randi W. v. Muroc Joint Unified School Dist*. (1997) 14 Cal.4th 1066, 1075; *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. (*Wolfe v. State Farm Fire & Casualty Ins. Co*. (1996) 46 Cal.App.4th 554, 560.)

The granting of leave to amend involves an exercise of the trial court's discretion. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) Thus, we must also decide whether there is any reasonable possibility any defect can be cured by amendment. If no such possibility exists, there has been no abuse of discretion and we must affirm. The plaintiff has the burden of proving a reasonable possibility of curing a defect by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 966-967.) When a demurrer is sustained with leave to amend but the plaintiff elects not to amend, we assume the complaint states as strong a case as possible. Thus, we affirm the judgment if the unamended complaint is objectionable on any ground raised by the demurrer. (*Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585.)

A

Two conditions must be met to establish breach of the implied covenant of good faith and fair dealing: (1) benefits due under the policy must have been withheld and (2) the reason for withholding benefits must have been unreasonable or without proper cause. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 35; *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1151.) If no benefits are due under the policy, a bad faith claim is barred as a matter of law. (*Brodkin v. State Farm Fire & Casualty Co*. (1989)

217 Cal.App.3d 210, 218; *Ray v. Farmers Ins. Exchange* (1988) 200 Cal.App.3d 1411, 1418, fn. 4.)

Uninsured motorist coverage is limited to accidents "arising from the 'ownership, maintenance or use of the uninsured motor vehicle.'" (*Chong v. California State Automobile Assn*. (1996) 48 Cal.App.4th 285, 287.) Thus, as a matter of law, the uninsured motorist provisions of a policy do not apply to accidents involving an insured motorist. (*State Farm Mut. Auto. Ins. Co. v. Superior Court* (1994) 23 Cal.App.4th 1297, 1299.)

Eriksson's complaint admits Castillo was insured. Because no benefits for uninsured motorist coverage were due under the policy, Eriksson cannot state a claim for breach of the implied covenant of good faith and fair dealing.

B

In an attempt to avoid this result, Eriksson contends coverage was created by waiver or estoppel because GEICO agreed to cover the claim under the uninsured motorist provisions of the policy. However, once liability has been incurred or a loss sustained, the doctrines of implied waiver and estoppel, based on the conduct or action of the insurer, are not available to bring within the policy's coverage risks not covered by its terms or those expressly excluded. (*Manneck v. Lawyers Title Ins. Corp*. (1994) 28 Cal.App.4th 1294, 1303; *Aetna Casualty & Surety Co. v. Richmond* (1977) 76 Cal.App.3d 645, 652-653; *Connor v. Union Automobile Ins. Co*. (1932) 122 Cal.App.

105, 110-111.)[1] Here, GEICO's offer to handle Eriksson's personal injury claim under the uninsured motorist provision of the policy cannot create or extend coverage where the accident involved an insured motorist, and thus no coverage existed.

Eriksson asserts GEICO expressly waived the condition of coverage that Castillo be uninsured. However, even an express agreement to provide benefits under a policy cannot create coverage where it does not otherwise exist. (*Manneck v. Lawyers Title Ins. Corp., supra,* 28 Cal.App.4th at pp. 1298, 1303 [insurer's agreement to act on behalf of insured did not create coverage based on doctrine of waiver]; *Connor v. Union Automobile Ins. Co., supra,* 122 Cal.App. at p. 110 [doctrine of waiver based on insurer's authorization of repairs and payment of partial benefits could not be used to create liability for conditions specifically excluded by terms of insurance policy].) Moreover, the type of "policy conditions" subject to waiver are those that are prerequisites to establishing liability, such as prompt notice of the accident. (*Connor v. Union Automobile Ins. Co., supra,* 122 Cal.App. at p. 110*;* see also *Elliano v. Assurance Co. of America* (1970) 3 Cal.App.3d 446, 449 [waiver of formal "proof of loss" requirement]; *Dickinson v. General Accident F. & L. Assur. Corp*. (9th Cir. 1945) 147 F.2d 396, 398 [waiver of written notice].) The "uninsured motorist" requirement is an element, not a condition, of coverage.

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1 In *Connor*, the court explained an insurer could be estopped from denying coverage when there is fraud or misleading conduct in the sale of an insurance policy. (*Conner v. Union Automobile Ins. Co., supra*, 122 Cal.App. at p. 110.) Here, however, Eriksson alleged bad faith conduct by GEICO after, not before, coverage was in effect and a loss occurred.

Even if estoppel could create coverage based on post-loss conduct, Eriksson has not sufficiently alleged the necessary element of detrimental reliance. (See *Ringler Associates Inc. v. Maryland Casualty Co*. (2000) 80 Cal.App.4th 1165, 1190.) In claiming he detrimentally relied on GEICO's offer to handle his claim as an uninsured motorist claim, Eriksson alleged he: (1) discontinued all efforts to resolve the matter directly with Castillo and/or Orion; and (2) was unable to resolve his personal injury claim with Castillo and/or Orion in a timely manner, forcing him to file a lawsuit in order to toll the statute of limitations and protect his rights.[2] However, filing a lawsuit is insufficient as a matter of law to show detriment. (See *Equitable Life Assurance Society v. Berry* (1989) 212 Cal.App.3d 832, 842.) In any event, as a result of any alleged reliance on GEICO's settlement offer, Eriksson was returned to the position he was in before the offer: an injured person with a fully preserved cause of action against the person who caused his injuries. Thus, GEICO's belated but correct decision it owed nothing to Eriksson, causing Eriksson to proceed with his claim against Castillo, is not a legal detriment.

The rule precluding coverage by waiver and estoppel is entirely consistent with the rule that the implied covenant of good faith and fair dealing does not impose obligations on an insurer beyond the express terms of the insurance policy. "[T]he covenant is

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[2] At the hearing on the demurrer, counsel for Eriksson conceded Orion made a settlement offer before Eriksson filed his lawsuit.

implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's right to the benefits of the agreement. . . . Absent that contractual right, however, the implied covenant has nothing upon which to act as a supplement, and 'should not be endowed with an existence independent of its contractual underpinnings.' [Citation.]" (*Waller v. Truck Ins. Exchange, Inc., supra*, 11 Cal.4th at p. 36; *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1032.) The insured is entitled only to the economic protection offered in exchange for the premium paid. Thus, "'[t]he terms and conditions of the policy define the duties and performance to which the insured is entitled.' [Citation.]" (*Kransco v. American Empire Surplus Lines Ins. Co*. (2000) 23 Cal.4th 390, 400.)

Here, Eriksson admits Castillo was not an uninsured motorist. As a matter of law, Eriksson's claim was not covered under the uninsured motorist provisions of his policy. GEICO's initial offer to settle Eriksson's claim, an offer he rejected, was a proposed accommodation that extended beyond the terms of the policy and for which Eriksson paid no premium. Thus, GEICO's revocation of its gratuitous offer cannot give rise to a claim for bad faith.

C

Eriksson contends his complaint alleges facts sufficient to state a claim for breach of contract based on GEICO's oral agreement to cover his claim under the uninsured motorist provision of the policy. Preliminarily, we note the trial court gave Eriksson leave to amend his complaint to allege any causes of action against GEICO other than

breach of the covenant of good faith and fair dealing. Because Eriksson elected not to file an amended complaint, he has waived his right to allege a cause of action for breach of contract.

Nevertheless, we examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. (*Wolfe v. State Farm Fire & Casualty Ins. Co*., *supra*, 46 Cal.App.4th at p. 560.) The allegations GEICO breached an enforceable oral contract by retracting its initial offer to cover Eriksson's uninsured motorist claim are indistinguishable from allegations GEICO waived a condition to uninsured motorist coverage by express agreement. As we previously discussed, a post-loss agreement to provide benefits under a policy cannot create coverage where coverage does not otherwise exist.

Further, Eriksson's complaint does not allege the requisite elements of a contract. Mutual assent, typically established by an offer and acceptance, is essential to the formation of any contract. (Civ. Code, §§ 1550, 1565; *McGough v. University of San Francisco* (1989) 214 Cal.App.3d 1577, 1584.) Here, the complaint alleges GEICO offered to pay Eriksson $3,300 to settle his personal injury claim under the uninsured motorist provision of the policy, but Eriksson rejected that offer and made a counter-offer to settle his claim for $6,500. Indeed, the complaint alleges GEICO "rescinded" its offer to handle Eriksson's claim under the uninsured motorist provision of the policy. Because there was no offer and acceptance, the absence of mutual assent precludes the formation of an oral contract. (Civ. Code, § 1586 [offeror may revoke offer at any time before the offeree communicates acceptance]; 1 Witkin, Summary of California Law (9th ed. 1987)

Contracts, § 172, p. 187; Rest.2d, Contracts, § 39 [counter-offer].) Eriksson cannot state a claim for breach of contract, nor is there a reasonable possibility he could cure any defect by amendment. Accordingly, the court properly sustained GEICO's demurrer without leave to amend.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.